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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 288

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ERIE RESISTOR CORPORATION AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 613, AFL–CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Circuit Court proceedings pp. 14–21) is reported at 303 F. 2d 359. The findings of fact, conclusions of law and order of the Board (R. 3a–32a) are reported at 132 NLRB 621.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1962 (Circuit Court proceedings, p. 22). The petition for a writ of certiorari was filed on July 30, 1962, and was granted on October 8, 1962 (Circuit Court proceedings, p. 24). The jurisdiction of this

Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et. seq.*), are set forth in the Appendix, *infra*, pp. 40–42.

QUESTION PRESENTED

Whether it is a violation of Section 8(a)(1) and (3) of the National Labor Relations Act for an employer to discriminate between employees who strike and employees who work during a strike by awarding an additional arbitrary seniority credit—in this case 20 years—to replacements for strikers and also to strikers who return to work during the strike, so that in a subsequent lay-off, strikers who did not return to work until after the strike's termination were laid off as junior employees.[1]

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Early in 1959, the Erie Resistor Corporation and Local 613 of the International Union of Electrical, Radio and Machine Workers, AFL–CIO, the representative of the company's production and maintenance employees, met to negotiate the terms of a new contract (R. 37a–38a; 73a–75a, 213a–232a).[2] The

[1] If this question is answered affirmatively, it follows that the Company refused to bargain, in violation of Section 8(a)(5) of the Act, by insisting that this or a similar form of super-seniority policy be made a part of any collective bargaining agreement (see *infra*, p. 9).

[2] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

parties were unable to reach agreement and, on March 31, 1959, when the old contract expired, the Union called a strike in support of its demands, which was joined by all of the approximately 478 employees working in the unit (R. 4a; 69a–70a, 145a).[3]

Throughout April, the month following the commencement of the strike, the Company maintained production at approximately 15 to 30 percent of normal by transferring 140 clerical and other non-unit employees to production jobs (R. 4a; 409a–410a, 429a–430a, 451a, 522a). Although the Company had received applications for employment as early as a week or two after the strike began, it did not attempt until the next month to fill the production unit with employees from outside the plant (R. 4a; 393a–394a). On May 3, the Company notified all members of the Union by letter that it intended to begin hiring replacements and that strikers would retain their jobs until replaced (R. 4a; 230a, 560a–561a). In accordance with this notice the Company began to hire replacements during the week of May 11, assuring the new employees, after they were accepted for employment, that they would not be discharged or laid off upon settlement of the strike (R. 4a; 174a, 367a).

In a bargaining session held on May 11, the Company told the Union that it was promising replacements job security and that it intended to implement this promise by according them some form of super-

[3] In addition to the approximately 478 employees who went on strike, 450 employees in the unit were in layoff status (R. 5a, n. 2; 69a–70a).

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seniority (R. 4a; 120a, 200a–202a).[4] At five bargaining sessions held between May 11 and May 28, the Company proposed several alternative forms of superseniority, offering to negotiate the precise nature of the seniority benefit to be accorded replacements but stating that superseniority in some form was "something that management people want and must have" (R. 4a, 21a; 120a, 200a–203a).[5] The Union opposed the Company's various seniority proposals, contending that no matter what particular form superseniority might take it would necessarily work an illegal discrimination against the strikers (R. 4a; 224a). As significant progress was made in the negotiations on other issues, superseniority became the focal point of disagreement (R. 21a; 219a–222a, 356a).

By May 25, the Company had recalled 32 of the employees in layoff status, hired one new employee, and put four returning strikers to work in the production unit (R. 5a; 522a). On May 28, the Company informed the Union that it had decided to give both replacements and strikers who returned to work during the strike 20 years additional seniority, which would be used only upon future layoffs and would not affect employee benefits based on years of service (R. 5a–6a; 129a, 211a, 564a–565a). At a union meeting on May 29, the strikers unanimously resolved to con-

[4] When the strike started, a male employee needed seven years seniority to avoid layoff; a female employee, nine years (R. 5a, n. 2; 70a).

[5] At this time the city of Erie was classified by the United States Department of Labor as an area of severe unemployment; at least 12 percent of the total labor force was unemployed (R. 6a, n. 3; 188a–189a, 587a).

tinue striking "until management stops its unfair labor practice by making us agree to * * * superseniority [for] the scabs" (R. 6a; 274a). That weekend, May 30 and 31, the Union publicized the Company's 20-year superseniority plan over the local television station (R. 6a; 173a).

By the end of the first week in June, the Company had hired a total of 57 replacements and reinstated eight returning strikers (R. 522a). During that same week, the Company and Union reached agreement on several seniority provisions which had been in dispute, but superseniority remained in issue (R. 6a; 126a–127a). On June 10, the Company wrote a letter to all employees and members of the Union, making its first announcement to them of the 20-year superseniority plan (R. 6a; 130a–131a). Although the Union offered to give up union security if the Company would abandon superseniority or go to arbitration on the question, and threatened to continue striking if it did not, the Company position remained firm and no agreement was reached (R. 6a; 332a–333a).

By June 14, 81 replacements (47 employees recalled from layoff status and 34 new employees), and 23 returning strikers had accepted production unit jobs (R. 7a; 394a–395a, 522a). On June 15, the Company posted the 20-year superseniority plan on its bulletin board (R. 7a; 122a). In the following week, 64 strikers returned to work and 21 replacements took jobs in the unit, bringing the total number of replacements to 102 and returned strikers to 87 (R. 7a; 394a–395a; 522a). When the number of returned strikers went up to 125 in the week beginning June

22, the Union decided it had to settle the strike. It offered to withdraw the picket line and submit the superseniority issue to the Board, and the parties drew up a tentative agreement on the remaining economic issues (R. 7a; 212a–214a, 522a). Although the Company notified the Union on the evening of June 24 that it would not accept the terms of the tentative agreement, the Union, on June 25, nonetheless called an end to the strike and requested reinstatement for the strikers (R. 7a; 43a, 166a, 212a–216a, 567a).

The next day the Company gave the Union a list of 129 strikers whom the Company would not reinstate because their jobs had been filled by replacements (R. 7a; 228a–229a).[6] In the next few weeks following the strike's termination, the Union received approximately 173 resignations from membership (R. 16a; 260a–263a).

On July 17, 1959, the parties executed a settlement agreement, providing that the propriety of the "Company's replacement and job assurance policy" should be "resolved by the NLRB and the Federal Courts" and should "remain in effect pending final disposition" (R. 7a–8a; 578a). The Company and Union also executed a new contract on this date (R. 8a; 316a, 580a).

Following the strike's termination, the Company began to reinstate those strikers who had not been replaced (R. 7a; 411a–412a). In September 1959, the Company's production unit work force reached a

[6] The Company had received approximately 300 job applications which had not been processed at the strike's end (R. 6a; 392a–393a).

high of 442 employees (R. 7a; 399a–400a, 523a). Economic layoffs in succeeding months, however, gradually reduced the work force to 240 by May 1960 (R. 7a; 399a–400a, 524a). A large number of employees laid off during this cut-back period were reinstated strikers whose seniority concededly became insufficient to retain employment solely as a result of the Company's superseniority policy (R. 7a; 176a).

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board held that the Company's policy of granting 20 years superseniority for replacements and returning strikers violated Section 8(a) (1) and (3) of the Act, irrespective of the Company's possible economic justification therefor (R. 18a–19a).[7] In the Board's view, the policy greatly diminished the right to strike guaranteed by the Act and, since it discriminated against employees solely on the basis of their participation in a strike called by their union representative, discouragement of union activity was "inescapable and demonstrable." Thus, a violation of Section 8(a) (1) and (3) was established without a showing that the employer subjectively intended to discourage union activity. Nor, in the Board's view, was the policy privileged by *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (discussed *infra*, pp. 20–26, 36–38), for "superseniority is a form of discrimination extending far beyond the employer's right

[7] The board, therefore, declined to pass on the Company's contention that it was economically necessary to institute superseniority in order to obtain striker replacements (R. 19a, n. 29).

of replacement sanctioned by *Mackay*" (R. 11a). Having found that the superseniority arrangement violated Section 8(a) (1) and (3) of the Act, the Board further concluded that the Company refused to bargain, in violation of Section 8(a)(5), by insisting, as a condition to reaching a collective bargaining agreement with the Union, that the agreement contain a clause ratifying the Company's grant of superseniority (R. 20a–21a).

The Board, *inter alia*, ordered the Company to rescind its superseniority policy and to reinstate with back pay any recalled strikers laid off solely as a result of the policy;[8] to bargain with the Union upon request; and to post appropriate notices (R. 25a–28a).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals declined to enforce the Board's order. The court stated (Circuit Court proceedings, p. 21):

> We reject as unsupportable the rationale of the Board that a preferential seniority policy is illegal however motivated. We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the con-

[8] The Board also found that on May 29, when the Union voted to continue striking until the Company stopped insisting on superseniority (*supra*, pp. 4–5), the strike became an unfair labor practice strike. Accordingly, the strikers not replaced by that date were unlawfully discriminated against when the Company denied their unconditional offer to return to work on June 25, 1959 (R. 20a–22a). To remedy this further discrimination, the Board ordered the Company to offer reinstatement to strikers who had not been replaced by May 29 and who offered to return on June 25, and to compensate such strikers for any loss in wages attributable to the June 25 refusal (R. 23a–24a).

comitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy * * *."

INTRODUCTION AND SUMMARY OF ARGUMENT

The critical issue is whether respondent's promise of superseniority to strike-breakers and concomitant reduction of strikers to inferior status violated Sections 8(a) (1) and (3) of the National Labor Relations Act. If this was a violation, the strike admittedly became an unfair labor practice strike and the Board's order was proper. *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927–928 (C.A. 2). It is also clear that, if the superseniority plan was unlawful, there was a refusal to bargain in violation of Section 8(a)(5). *National Labor Relations Board* v. *Wooster Division of Borg-Warner*, 356 U.S. 342.

I. Sections 7 and 8(a)(1), read together, make it an unfair labor practice "to interfere with, restrain,

[9] The holding of the court below, although in accord with that of the Ninth Circuit in *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82, is in conflict with that of the Sixth Circuit in *Swarco, Inc.* v. *National Labor Relations Board*, 303 F. 2d 668, petition for certiorari pending, No. 335, this Term. In three other cases, superseniority plans have been held to violate the Act, but the evidence in those cases warranted a finding that the plans were motivated by a desire to penalize the strikers rather than by economic considerations. *Olin Mathieson Chemical Corp.* v. *National Labor Relations Board*, 232 F. 2d 158 (C.A. 4), affirmed, 352 U.S. 1020; *National Labor Relations Board* v. *California Date Growers Ass'n*, 259 F. 2d 587 (C.A. 9); *Ballas Egg Products, Inc.* v. *National Labor Relations Board*, 283 F. 2d 871 (C.A. 6).

or coerce employees in the exercise of the * * * right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." A normal strike for economic objectives is a concerted activity protected by Sections 7 and 8 (a)(1). To reward the strike-breakers—the replacements and the employees who returned to work despite the strike—by giving them top seniority and to punish the strikers by putting them on the bottom of the roster does in fact coerce and restrain employees in the exercise of the right to strike. The trial examiner found that the employer's motive was not to punish but to induce enough employees to come to work to operate the factory despite the strike. The Board correctly held that the ultimate motive for the coercion and restraint was irrelevant. The coercion and restraint obviously occurred; few things could be more coercive in relation to a strike than to gain seniority by returning to work and to lose it by continuing on strike. The coercion was intended, for it was the patently inescapable consequence of the employer's acts. An unfair labor practice is not excused by the employer's belief that it is the most effective way to operate his business.

Nor is this case like *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, where the Court held that in the absence of an unfair labor practice an employer is not required to make room for the reinstatement of strikers by discharging employees hired as permanent replacements during a strike. The guarantee of superseniority goes far beyond the mere hiring of employees

to operate a plant during a strike upon the same conventional basis as workers are normally hired—at will but with the expectation of continuing employment unless discharged for inefficiency or misconduct or laid-off for lack of work. Its impact continues into the indefinite future. It divides the labor force permanently into two groups—those whose jobs are made relatively insecure because they remained loyal to a lawful strike and those whose job security is enhanced because they went or returned to work before the strike was over. Where there is a conflict between the interest of employees in freedom to strike without restraint or coercion, on the one hand, and of the employer in resuming operations, on the other hand, it is the responsibility of the Board to balance the conflicting legitimate interests, subject only to limited judicial review. The balance struck by the Board in this case correctly effectuates the national labor policy and should not have been reversed by the court of appeals.

II. Respondent's superseniority program also violates Section 8(a)(3). It discriminates among employees, as pointed out above, on the basis of their participation in concerted activities protected by Section 7. Both the Board and the courts have uniformly treated such discrimination as a violation of Section 8(a)(3) because the natural and probable consequence of discriminating against employees who engage in concerted activities sponsored by a union is to discourage membership in the union.

An employer may not justify discrimination on the basis of union membership or activity by proof that

it was necessary to the successful operation of his business. For example, it was settled as early as 1938 that an employer who discharged his employees who were members of one labor union could not justify the discrimination by showing that the discharges were necessary to induce another union to remove a picket line that halted the operation of his business. *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465 (C.A. 9). Here, as there, the ultimate motive is immaterial.

Nor was it necessary for the Board to offer proof of a specific intent to discourage union membership. Proof of this motive or intent is highly relevant in the conventional discharge case where the question is whether the employer has in fact discriminated against an employee (i.e., treated him differently from other employees) by reason of his union membership. But when union membership is the stated ground for differentiation no further proof is required because the employer is then responsible for the discouragement to union membership which is the natural and probable consequence of the discrimination. *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 44–45. The same rule should apply where the discrimination is avowedly based upon union-sponsored activities protected by Section 7.

ARGUMENT

I

THE AWARD OF SUPERSENIORITY TO NON-STRIKERS AND REPLACEMENTS VIOLATED SECTION 8(a)(1) BY RESTRAINING AND COERCING EMPLOYEES IN THE EXERCISE OF THE RIGHT TO STRIKE

A. RESTRAINT OR COERCION OF EMPLOYEES IN THE EXERCISE OF THE RIGHT TO STRIKE VIOLATES SECTION 8(a)(1)

Section 8(a)(1) provides that it shall be an unfair labor practice for an employer—

> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

One of the rights guaranteed by Section 7 is "the right * * * to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." It is settled law that this includes the right to strike. *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 457; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 389, 404; *Mine Workers* v. *Arkansas Flooring Co.*, 351 U.S. 62, 75.

It is equally well settled that conduct which coerces or restrains employees in the exercise of the right to strike violates Section 8(a)(1) and, for reasons we state below, also Section 8(a)(3) of the Act. Thus an employer may not discharge employees for going on strike, or threaten them with discharge, telling all employees who fail to report back for work that they will be treated as having resigned.[10] It is an unfair

[10] *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927–928 (C.A. 2); *J. A. Bentley Lumber Co.* v.

labor practice to assign employees—because they resorted to concerted activities—to less desirable jobs, to deny them vacation or bonus benefits, or to lay them off or deprive them of accumulated seniority.[11]

Respondent's conduct, as we now show, is condemned by the foregoing rule. Its seniority program restrained and coerced employees for engaging in concerted activities by continuing a lawful strike.

National Labor Relations Board, 180 F. 2d 641, 642 (C.A. 5); *National Labor Relations Board* v. *Kennametal Inc.*, 182 F. 2d 817, 818–819 (C.A. 3); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 901 (C.A. 3); *National Labor Relations Board* v. *Globe Wireless*, 193 F. 2d 748, 750 (C.A. 9); *National Labor Relations Board* v. *U.S. Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5); certiorari denied, 346 U.S. 818; *National Labor Relations Board* v. *Southern Silk Mills, Inc.*, 209 F. 2d 155 (C.A. 6); *National Labor Relations Board* v. *Beaver Meadow Creamery*, 215 F. 2d 247, 252 (C.A. 3); *National Labor Relations Board* v. *McCatron*, 216 F. 2d 212, 214–215 (C.A. 9), certiorari denied, 348 U.S. 943; *National Labor Relations Board* v. *Brookville Glove Co.*, 234 F. 2d 400, 401 (C.A. 3); *Summit Mining Corp.* v. *National Labor Relations Board*, 260 F. 2d 894, 897–898 (C.A. 3); *National Labor Relations Board* v. *John S. Swift Company*, 277 F. 2d. 641, 646 C.A. 7); *Editorial "El Imparcial," Inc.* v. *National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1).

[11] *Republic Steel Corp.* v. *National Labor Relations Board*, 114 F. 2d 820, 821 (C.A. 3); *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 931 (C.A. 2); *National Labor Relations Board* v. *A. Sartorius & Co.*, 140 F. 2d 203, 205, 207 (C.A. 2); *Olin Industries, Inc.* v. *National Labor Relations Board*, 191 F. 2d 613, 616 (C.A. 5); *National Labor Relations Board* v. *Wheeling Pipe Line, Inc.*, 229 F. 2d 391, 394–395 (C.A. 8); *National Labor Relations Board* v. *Solo Cup Co.*, 237 F. 2d 521, 525–526 (C.A. 8); *National Labor Relations Board* v. *M & M Bakeries, Inc.*, 271 F. 2d 602, 605–(C.A. 1); *Editorial "El Imparcial," Inc.* v. *National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1).

B. THE AWARD OF SUPERSENIORITY TO NON-STRIKERS AND REPLACEMENTS IN FACT RESTRAINS AND COERCES EMPLOYEES IN THE EXERCISE OF THE RIGHT TO STRIKE

A seniority program that prefers non-strikers over strikers is manifestly coercive in fact regardless of the employer's motive. The worker who accepts employment during the strike and the employee who returns to work are rewarded while the employee who stays on strike is penalized, each for as long as he remains in the bargaining unit. In the present case the strike-breakers—the replacements and the employees who returned to work—were credited with 20 years additional service in preparing seniority rosters. The net effect is that, barring a few long-service employees, all strike-breakers will permanently have a preference over all strikers in obtaining and holding jobs in the event of vacancies and layoffs. The announcement of such a program threatens strikers with heavy economic sanctions. Its implementation in future years would stand as a constant warning of the penalties of going on strike.

It is equally apparent that the restraint and coercion were intended—assuming *arguendo* that intent is relevant. The intent to restrain and coerce is not to be confused with the employer's ultimate motive, which the Examiner found to be to resume operation of the plant, and which the Board regarded as irrelevant. One who breaks a jewelry store window to reach and steal a diamond ring may be motivated by a desire to raise money to feed his hungry children but he intends nonetheless to break the window and take the ring. The success of respondent's plan for resuming operations depended upon its threatening severe enough

sanctions against those who continued the strike to coerce employees to return to work. Nor can it be fairly said that there were no threats against strikers, but only a promise of benefit to strike-breakers. Each strike-breaker who was awarded greater seniority could receive it only at the expense of an employee who exercised the right to strike. Thus, the sword was two-edged—a promise of benefits for some which was inseparable from the penalty imposed against others for exercising the statutory right that Sections 7 and 8(a)(1) protect.

The trial examiner and court of appeals accepted respondent's argument that the coercion and restraint which in fact were used were not unlawful because respondent's purpose was to get its plant back into operation and not merely to punish employees for going on strike. The argument overlooks a critical distinction. Normal business conduct, such as granting a wage increase, reducing wages, laying off an extra shift or shutting down a plant may have the incidental consequence of interfering with union activities but it is lawful unless the employer is acting not for normal business reasons but for the purpose of interfering with those activities. *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. 2d 474, 478–479 (C.A. 5); *National Labor Relations Board* v. *Moltrup Steel Products Co.*, 121 F. 2d 612, 613–614 (C.A. 3); *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477, 483 (C.A. 3); *National Labor Relations Board* v. *Norma Mining Corp.*, 206 F. 2d 38, 42 (C.A. 4); *National Labor Relations Board* v. *Cleveland Trust Co.*, 214 F. 2d 95, 99 (C.A. 6); *National Labor Relations Board* v. *New Madrid Mfg. Co.*, 215 F. 2d 908,

911–912 (C.A. 8); *National Labor Relations Board* v. *The Newton Co.*, 236 F. 2d 438, 446 (C.A. 5). See also *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 739 (C.A. D.C.), certiorari denied, 341 U.S. 914. The reason is that the employer has the privilege to interfere with the employees' interests, in such cases, in order to carry on normal business functions, but his immunity exists only if he acts for the purpose for which the privilege was given; should his motive be anti-union, the privilege will not protect him. See *National Labor Relations Board* v. *Kelly & Picerne*, 298 F. 2d 895, 898 (C.A. 1); *National Labor Relations Board* v. *Brown-Dunkin*, 287 F. 2d 17, 19 (C.A. 10); *National Labor Relations Board* v. *Houston Chronicle*, 211 F. 2d 848, 851 (C.A. 5). This is not a special rule applicable to labor cases. It accords with the general law of torts. See *National Labor Relations Board* v. *Columbia Products Corp.*, 141 F. 2d 687, 688 (C.A. 2).

There are many instances, on the other hand, in which the employer's "good" motive is irrelevant because he has singled out union membership or activity and imposed coercion or restraints thereon which so impair employee rights that, on balance, the action cannot be justified by its ultimate business purpose. Thus the employer's motive has been held irrelevant where he prohibited the wearing of union buttons in the plant, forbade the solicitation of members on plant property even though the employees were not working, or prohibited the employees from distributing union pamphlets in the company parking lot. *Republic Aviation Co.* v. *National Labor Relations Board*, 324 U.S. 793.

Similarly, an employer cannot justify the discharge of union members upon the ground that this is the only way to induce a rival union to remove a picket line and permit the resumption of business operations. *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465 (C.A. 9). Nor may an employer defend his refusal to bargain about a certain topic of about the working conditions of certain groups of employees upon the ground that the bargaining would interfere with proper operation of the business. *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 752 (C.A. 7); *National Labor Relations Board* v. *National Broadcasting Co.*, 150 F. 2d 895, 900 (C.A. 2); *National Labor Relations Board* v. *Harris*, 200 F. 2d 656, 659 (C.A. 5); *National Labor Relations Board* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 263 (C.A. 9); see also *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 162 F. 2d 435, 440 (C.A. 7). Indeed, we suppose that a good proportion of employers could conscientiously assert that their unfair labor practices were not malicious or vindictive but were motivated by their judgment as to the best interests of the business. Such motives, however, will not excuse conduct which violates rights guaranteed by Section 7.

Accordingly, the present case comes down not to a question of motive but to the question whether the coercion and restraint of employees in their right to engage in concerted activities, which results from a program of giving superseniority to strike-breakers, can be justified by its usefulness to

an employer in resuming business operations during a strike. If the National Labor Relations Act recognizes the privilege of giving superseniority, then the employer's motive in a particular case may be material since he would lose the privilege if he acted not for the business purpose but out of a desire to exact reprisals against the striking employees. On the other hand, if the law gives no such privilege because the damage to employees' rights outweighs the employer's interests when the two are balanced with a view toward effectuating the policies of the National Labor Relations Act, then the employer's motive is utterly irrelevant.

We turn now to the critical question.

C. THE RESTRAINT AND COERCION OF EMPLOYEE RIGHTS THAT IN FACT RESULTS FROM GIVING SUPERSENIORITY TO STRIKE-BREAKERS CANNOT BE LEGALLY JUSTIFIED BY THE EMPLOYER'S INTEREST IN RESUMING BUSINESS OPERATIONS DESPITE THE STRIKE

The right to strike, peacefully and for normal labor objectives, is one of the fundamental rights protected by the National Labor Relations Act. Not only is it protected as a concerted activity under Section 7 (see pp. 13–14, *supra*), but Section 2(3) provides that individuals who strike shall not lose their status as "employees"; and Section 13 cautions that, "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike."

Discrimination against strikers, threatening them with reprisals unless they abandon the strike, or im-

posing penalties upon strikers all are unfair labor practices under Sections 8(a) (1) and (3).[12]

Many of these cases implicitly reject the notion that the interference, restraint and coercion can be justified by the employer's desire to induce the strikers to return to work. This is the obvious purpose of such tactics as announcements that all employees who do not return to work will be treated as voluntary quits and rehired only as new employees; yet those tactics have uniformly been held unlawful.[13]

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[12] *J. A. Bentley Lumber Co.* v. *National Labor Relations Board*, 180 F. 2d 641, 642 (C.A. 5); *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 818, 819 (C.A. 3); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 901 (C.A. 3); *Collins Baking Co.* v. *National Labor Relations Board*, 193 F. 2d 483, 485–487 (C.A. 5); *National Labor Relations Board* v. *Globe Wireless*, 193 F. 2d 748, 750 (C.A. 9); *National Labor Relations Board* v. *Southern Silk Mills, Inc.*, 209 F. 2d. 155 (C.A. 6); *National Labor Relations Board* v. *McCatron*, 216 F. 2d 212, 214–215 (C.A. 9), certiorari denied, 348 U.S. 943; *National Labor Relations Board* v. *Wheeling Pipe Line, Inc.*, 229 F. 2d 391, 394–395 (C.A. 8); *Olin Mathieson Chemical Corp.* v. *National Labor Relations Board*, 232 F. 2d 158 (C.A. 4), affirmed, 352 U.S. 1020; *National Labor Relations Board* v. *California Date Growers Assoc.*, 259 F. 2d 587 C.A. 9); *National Labor Relations Board* v. *M & M Bakeries, Inc.*, 271 F. 2d 602, 605 (C.A. 1); *Editorial "El Imparcial," Inc.* v. *National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1); *Ballas Egg Products, Inc.* v. *National Labor Relations Board*, 283 F. 2d 871 (C.A. 6). For a more complete discussion of the analysis under Section 8(a)(3), see pp. 27–28, *infra*.

[13] *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 901 (C.A. 3); *National Labor Relations Board* v. *U.S. Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818; *National Labor Relations Board* v. *Beaver Meadow Creamery*, 215 F. 2d 247, 252 (C.A. 3); *National Labor Relations Board* v. *Brookville Glove Co.*, 234 F. 2d 400, 401 (C.A. 3); *Editorial "El Imparcial," Inc.* v. *National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1).

We recognize that the right to strike is not so absolute that Section 8(a)(1) can be read to prohibit every interference. The employer is privileged to operate the plant during the strike and, where his interest collides with the interests of the employees, the Board and courts must strike a balance. Thus, in *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, the Court held that an employer may hire permanent replacements during a strike and retain them in their jobs thereafter in preference to strikers seeking reinstatement, even though this method of filling the strikers' places tends to discourage them from remaining on strike. Similarly, it was held in *National Labor Relations Board* v. *Truck Drivers, Local No. 449*, 353 U.S. 87, that the employer's interest in maintaining the integrity of a multi-employer bargaining unit might justify the interference with the exercise of the right to strike that resulted from locking out all the employees in the unit when the employees of one employer went on strike. "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review" (*id.* at 96).

In the present case, we submit, the balance struck by the Board is plainly correct. The practice of granting superseniority is utterly unlike the hiring of permanent replacements sanctioned in the *Mackay* case. There it was but a step in the normal conduct of the business. In the United States industrial

workers and most craftsmen are hired at will but with the expectation of continued employment unless the employee is discharged for cause or dismissed for lack of work. Hiring permanent replacements, therefore, conformed to normal hiring practices, except that the number required was greater because of the strike. Granting an arbitrary 20 years additional seniority to those who commence or return to work during the strike is a complete departure from all normal business practices, a departure developed by a few business firms as a method of breaking strikes. Nor can it fairly be said that the superseniority is like a temporary pay bonus to attract additional workers during a strike, assuming *arguendo* that such a bonus would be legal.[14] The guarantee of seniority to some is inevitably a permanent sentence of inferiority for others; the reward and penalty are inextricable.

As the Board pointed out (R. 11a), the degree of interference with protected rights is much greater when a system of superseniority is imposed than when the employer limits himself to hiring permanent replacements:

> * * * permanent replacement affects only those who are, in actuality, replaced, while superseniority for replacements affects the employment tenure of all strikers, whether or not replaced. It is one thing to say that a striker is subject to replacement, and therefore loss of his job at the strike's end; quite another to say that, in addition to the threat of replacement, and regardless of the employer's success in securing a replacement for the individual strik-

[14] The assumption is probably contrary to the actual rule. See, however, the cases cited in n. 16, *infra*.

ers, all strikers will at best return to their jobs with inferior seniority, thus incurring a detriment to their job security forever. Clearly, this is a discrimination in addition to the threat of replacement, and not merely a lesser form of discrimination encompassed by it.

Permanent replacement is a definable risk which the striker can measure, with some degree of certainty, in determining whether he will exercise his Section 7 rights.[14] He knows that, if he strikes, the only danger is that the employer may be able to obtain someone else, on a permanent basis, to take his job; he can make a judgment as to the likelihood of this occurring, and, if at the strike's end it has not happened, he is assured that no adverse consequences will result from the strike. On the other hand, a superseniority plan will "hit" the employee who elects to remain on strike even though the employer has not been able to accomplish the more difficult task of finding a permanent replacement for him; and it leaves the employee in a state of uncertainty, long after the strike has ended, as to how severely he will be affected.

Permanent replacement merely affects the particular job which is filled; the striker who had that job is displaced, but the status of the other employees in the plant remains unchanged. The grant of a seniority preference to those who work during a strike has effects which transcend the jobs which are "filled" as a result of this policy. By its very nature seniority

[14] Cf. *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F. 2d 87, 91 (C.A. 4), certiorari denied, 347 U.S. 835: "The right to reinstatement granted to a blameless unreplaced striker is designed to set the limit of the risk he runs by striking. That limit * * * is fixed at replacement by the employer or misconduct by the employee."

is a relative matter, and hence giving a seniority advantage to one particular group of employees must necessarily, not only improve their position, but also deteriorate the position of the other employees. See *General Electric Co.*, 80 NLRB 510, 512–513. A seniority preference therefore does more than assure an individual that, at the end of the strike, he will not be thrown out of the job which he takes during the strike; it gives him a superior claim, in the event that work should decline in the future, to other jobs as well.

The Board's experience has shown that "superseniority is normally offered not only to new employees—if to them at all—but to the bargaining unit employees themselves, if they abandon the strike or choose not to join it" (R. 12a–13a).[15] In reality, therefore, "an offer of superseniority is not merely an attempt to secure new 'replacements', but more accurately an offer of benefit to individual strikers

[15] In the instant case, it was offered to both new employees and strikers who returned to work. It was offered only to returning strikers in *Swarco, Inc.* v. *National Labor Relations Board*, 303 F. 2d 668 (C.A. 6), petition for certiorari pending, No. 335, this Term, and to returning strikers and other employees in *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (C.A. 9), and *Olin Mathieson Chemical Corp.* v. *National Labor Relations Board*, 232 F. 2d 158 (C.A. 4), affirmed, 352 U.S. 1020. As the Board stated (R. 12a, n. 18): "In none of the cases heretofore considered by the Board has superseniority been offered only to new employees." This is doubtless due to the fact that, if any bargaining unit employees are willing to go to work during a strike, the employer, as a practical matter, cannot place them in a worse position than newly hired employees.

to abandon the strike and return to work" (R. 13a).[16] As a consequence, superseniority effectively divides the strikers against themselves. As the Board observed (R. 14a): "All employees formerly on layoff, and younger strikers with low seniority, immediately see their chance-of-a-lifetime to gain at one stroke the security which only long years of employment could theretofore give them; employees longer in the employer's service sense the threat and are impelled to return to work to protect their seniority."[17]

Superseniority for those who work during a strike makes future bargaining difficult, if not impossible, for the collective bargaining representative. The right permanently to replace strikers, sanctioned by *Mackay*, ceases to be an issue when the strike is over. Superseniority, on the other hand, remains "a mutual irritant to the employees and to the Union" (R. 16a). Here, for example, the employees were perpetually divided into two factions—those who continued to

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[16] In other contexts, such an offer of benefits to strikers has been held to constitute an independent violation of Section 8(a)(1) of the Act. See *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 153 (C.A. 7); *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898, 905 (C.A. 6), affirmed, 356 U.S. 342; *National Labor Relations Board* v. *Clearfield Cheese Co.*, 213 F. 2d 70, 73 (C.A. 3); *National Labor Relations Board* v. *James Thompson & Co.*, 208 F. 2d 743, 748 (C.A. 2).

[17] The present case illustrates the point. At the inception of the strike, all 478 employees in the bargaining unit honored the picket line or joined in strike activities. On June 10, the Company announced the superseniority plan in a letter to all employees and Union members. Thereafter, the total number of strikers who abandoned the strike steadily rose (R. 134; *supra*, pp. 4–6).

strike to the end and thus lost their seniority, and those who returned before the end of the strike and therefore have 20 years extra seniority. As the Board noted (R. 16a):

> This difference is reemphasized with each subsequent layoff, for those who supported the union most faithfully are likely to be the first laid off. It is doubtful whether the Union can ever again succeed in calling, or even threatening, a strike for those with 20 years superseniority will be fearful that this time replacements may, perhaps, be granted 40 years superseniority. Those who were lucky enough not to be replaced during the first strike will prefer to remain at work, and regain the seniority so abruptly lost during the first strike. The effective reward of nonstrikers and punishment of strikers inherent in supersenority stands as an ever-present reminder of the dangers connected with striking, and with union activities in general.

In light of the foregoing factors, we submit that the Board was reasonable in concluding that the right to hire replacements for strikers, recognized in *Mackay*, does not carry with it the right to impose the additional discrimination of superseniority whenever necessary to secure such replacements. Since "the Board correctly balanced the conflicting interests" (*National Labor Relations Board* v. *Truck Drivers, Local No. 449*, 353 U.S. 87, 97), its decision is entitled to stand.

II. THE AWARD OF SUPERSENIORITY TO NON-STRIKERS AND REPLACEMENTS VIOLATED SECTION 8(a)(3) BY DISCRIMINATING AGAINST EMPLOYEES WHO EXERCISED THE RIGHT TO STRIKE GUARANTEED BY SECTION 7, THEREBY DISCOURAGING MEMBERSHIP IN THE LABOR ORGANIZATION THAT SPONSORED THE STRIKE

Section 8(a)(3) provides that it shall be an unfair labor practice for an employer—

> by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Thus, there are two elements to the offense: (1) improper discrimination and (2) resulting encouragement or discouragement of union membership. *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 42–43; *Teamsters Local* v. *National Labor Relations Board*, 365 U.S. 667, 674–676.

Respondent's superseniority plan accomplished an unlawful discrimination. It divided the labor force permanently into two groups—those whose jobs were made relatively insecure because they remained loyal to a lawful strike and those whose job security was enhanced because they went or returned to work before the strike was over. The line was drawn, therefore, on the basis of whether an employee exercised the right to continue to engage in a concerted activity, a right guaranteed by Section 7.

Discrimination among employees based upon their participation or non-participation in union activities protected by Section 7 manifestly encourages or discourages membership in the labor organization. When

a union calls a strike or engages in other protected concerted activities and the employer exacts reprisals against those who exercise the protected rights, not only those employees who suffer, but others who observe the consequences of engaging in concerted activities for the purposes of collective bargaining, will lose interest in the union.[18] The Board and reviewing courts have, therefore, uniformly held that discrimination against employees for engaging in concerted activities protected by Section 7 is unfair discrimination under Section 8(a)(3).[19]

The court below erred in holding that "the discriminatory conduct of an employer is not unlawful in the

[18] Following the strike there were some 173 resignations from the Union (R. 16a; 260a–263a). Moreover, the subsequent layoff of a large number of strikers pursuant to the Company's super-seniority policy, the continuous threat of future layoffs based on strike activity, and the consequent weakening of the Union's collective bargaining position, could scarcely fail to have a further discouraging effect on union membership.

[19] *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 39–40; *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 132; *Joanna Cotton Mills* v. *National Labor Relations Board*, 176 F. 2d 749, 752 (C.A. 4), enforcing 81 NLRB 1398; *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 818–819 (C.A. 3); *National Labor Relations Board* v. *Smith Victory Corp.*, 190 F. 2d 56 (C.A. 2); *National Labor Relations Board* v. *Globe Wireless*, 193 F. 2d 748, 750 (C.A. 9); *National Labor Relations Board* v. *Southern Silk Mills, Inc.*, 209 F. 2d 155 (C.A. 6); *National Labor Relations Board* v. *McCatron*, 216 F. 2d 212, 214–215 (C.A. 9), certiorari denied, 348 U.S. 943; *National Labor Relations Board* v. *Solo Cup Co.*, 237 F. 2d 521, 525–526 (C.A. 8); *Summit Mining Corp.* v. *National Labor Relations Board*, 260 F. 2d 894, 897–898 (C.A. 3); *National Labor Relations Board* v. *John S. Swift Company*, 277 F. 2d 641, 646 (C.A. 7); *Editorial "El Imparcial," Inc.* v. *National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1).

absence of an illegal motive" (R. 18). When the fact of improper discrimination—discrimination based upon union membership or activities—has been proved, no further evidence of specific intent to encourage or discourage union membership is required, provided that the result, as will usually be the case, is the natural and probable consequence of the discrimination. Motive is important only in determining whether there has been discrimination, and perhaps in determining whether discrimination based upon grounds other than union membership or activity is in truth designed to encourage or discourage union membership. See pp. 32–33, *infra*.

The decisions of this Court establish the foregoing distinction. In *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, the employer had promulgated rules against wearing union buttons and soliciting union membership within the plant even during the employees' free time. When the employer discharged employees for violating the rule, the Board held that the rule violated Section 8(a)(1) and that the discharges violated Section 8(a)(3). In this Court the employer argued that there was no violation of Section 8(a)(3) even if the rules were unlawful because the rules were uniformly enforced, and the Court noted that the employer's action was not (p. 795) "motivated by opposition to the particular union or, we deduce, to unionism" and that (p. 797) "there was no union bias or discrimination by the company in enforcing the rule." Nevertheless, the Court sustained the Board. 324 U.S. at 805. The rules were held an undue interference with the rights

guaranteed by Section 7, not privileged because of the employer's interest in regulating the conduct of employees on his property. The discharges were also held to violate Section 8(a)(3). As this Court later explained in *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 46 (emphasis added)—

> Since the rules were no defense and the employers intended *to discriminate solely on the ground of such protected union activity*, it did not matter that they did not intend to discourage membership since such was a foreseeable result.

The Court applied the same principle in *Gaynor News Co.* v. *National Labor Relations Board*, 347 U.S. 17, a case decided in the same opinion as *Radio Officers*. In *Gaynor*, the company granted retroactive wage increases to union members but withheld the same benefits from other employees in the bargaining unit who were not members of the union. There was no evidence of a specific intent on the part of the employer to encourage union membership. It acted, the Court said, "from self-interest" and discriminated against the non-members "on the grounds that it was not contractually bound [to pay them the increase] and, in its business judgment, did not choose to do so" (347 U.S. at 36 and 37). Nevertheless, the Court held that Section 8(a)(3) had been violated (*id.* at 46) (emphasis added)—

> In holding that a natural consequence of discrimination, *based solely on union membership or lack thereof*, * * * the court [below] merely recognized a fact of common experience—that

> the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action. * * *

The reason underlying the rule that further proof of a specific intent to encourage or discourage union membership is not necessary after it appears that "the employer intended to discriminate solely on the ground of such protected union activity" or "solely on union membership status" was stated earlier in the *Radio Officers* opinion (347 U.S. at 45)—

> * * * an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established. * * *[20]

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[20] In further support of the proposition that proof of an intent to encourage or discourage union membership is not required in these circumstances, the Court in *Radio Officers* (347 U.S. at 45, n. 53) cited *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F. 2d 87 (C.A. 4), certiorari denied, 347 U.S. 935; *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898 (C.A. 3); *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 162 F. 2d 435 (C.A. 7); and *National Labor Relations Board* v. *Gluck Brewing Co.*, 144 F. 2d 847 (C.A. 8). *Industrial Cotton* and *Cusano* involved situations where employees who were in fact engaging in protected concerted activities were discharged by their employer under the honest, but mistaken, belief that they were engaging in misconduct which warranted their discharge; *Allis-Chalmers* involved a situation where, after a union had been selected for a bargaining unit consisting of rank-and-file employees and inspectors, the employer, allegedly motivated by the consideration that inclusion of inspectors in the same bargaining

There is no inconsistency between these decisions and the manifold expressions of courts and text writers[21] asserting that the decisive question under Section 8(a)(3) is the "real motive" for the employer's conduct. The typical case under Section 8(a)(3) raises a question of fact, and the context makes it clear that the expressions were directed at this problem and spoke of the "real motive" as the reason or underlying basis for the employer's action against the alleged victim of unfair discrimination. Thus the "real motive" is, and should be, decisive when the question to be decided is whether the employer has engaged in improper discrimination—that is to say, whether the employer discharged or took other action against an employee because of union membership or

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unit would have an adverse effect on production, reclassified the inspectors' jobs and limited their functions; and *Gluek Brewing* involved a situation where the employer, motivated by a desire to avoid a disruption and loss of business threatened by the Teamsters, discharged his own drivers represented by the Brewers and subcontracted out the trucking operation to a company represented by the Teamsters (see *infra*, pp. 35-36). In all of these cases, since union membership or activity was the basis for the discrimination, the Board's finding that the employer had discriminated in violation of Section 8(a)(3) was sustained, notwithstanding the employer's "good" motive.

[21] See, *e.g.*, *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 43; *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 132; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46; *National Labor Relations Board* v. *Electric City Dyeing Co.*, 178 F. 2d 980, 982 (C.A. 3); *National Labor Relations Board* v. *Blue Bell-Globe Mfg. Co.*, 120 F. 2d 974, 975 (C.A. 4); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 20; Millis & Brown, *From the Wagner Act to Taft Hartley*, pp. 428-429 (1950).

activity, or "for any reason other than union activity or agitation for collective bargaining with employees" (*Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 132). If union membership or activity is the basis, Section 8(a)(3) is violated. If the only basis for the discrimination is lawful—if the employer "discriminates" against employees who are guilty of insubordination or absenteeism, for example—any effect of the discharge upon union membership is irrelevant because the discrimination is not of the kind prohibited by the Act.

Teamsters Local 357 v. *National Labor Relations Board*, 365 U.S. 667, further illustrates the principle that the "true purpose" or "real motive" for the employer's action is relevant only in determining whether there has been, or will be, discrimination of a kind that violates Section 8(a)(3). The Board had held that a labor organization unlawfully attempted to cause an employer to violate Section 8(a)(3) by causing him to promise to hire all his employees through a union hiring hall at which it promised to engage in no discrimination because of the presence or absence of union membership. In setting aside the Board's order, this Court held that "discrimination cannot be inferred from the face of the instrument" (pp. 675–676) and concluded—

> It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. * * * But, as we said in *Radio Officers* v. *Labor Board, supra,* the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination."

In the instant case, the fact of discrimination is acknowledged. The "motive," in the sense of the subjective basis for the discrimination, being plain upon the face of the superseniority plan, is undisputed. The employer deliberately classified employees according to their continued exercise of the right to engage in concerted activities protected by the Act, favoring those who did not strike any longer and penalizing those who continued to exercise the right to strike. The "intent" to engage continuously in this discrimination is manifest, for the promise of superseniority ran from the time of the announcement during the strike into the indefinite future. Nor can respondent hope to deny that the natural and probable consequence of this discrimination on the basis of participation in concerted activities would be to discourage union membership.

Respondent's real defense is that the intentional discrimination against employees who continued to engage in this union activity, with its consequent discouragement to union membership, is justified by the ultimate objective of resuming business operations in the face of the strike. So far as we are aware no court has ever held, except in dealing with such a superseniority program, that discrimination on the basis of union membership or protected concerted activities can be excused by proof that it will serve the employer's business.[22] The contrary rule was laid

[22] In *Pittsburgh-Des Moines Steel Company* v. *National Labor Relations Board*, 284 F. 2d 74 (C.A. 9), the court held that a bonus based on productivity did not violate Section 8(a)(3) notwithstanding that it "penalized" employees who had been

down as early as *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465 (C.A. 9, 1938). In that case a Teamsters Union threatened to tie up the employer's business by a strike unless the employer required 20 employees to give up their membership in the Newspaper Guild. When the 20 employees refused but were unable to give the employer assurance that the papers would be delivered despite the threatened Teamsters' strike, the employer removed them from their usual positions and substituted members of the Teamsters Union. The Ninth Circuit held that the discrimination violated Section 8(a)(3) and rejected the defense that it was necessary to make the transfer because the business would otherwise be disrupted and therefore, under all the facts, the transfer was excusable. See 97 F. 2d at 470. The rule laid down there has been followed in numerous cases. *Wilson & Co., Inc.* v. *National Labor Relations Board*, 123 F. 2d 411, 417–418 (C.A. 8); *National Labor Rela-*

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on strike, for time spent on strike was counted as "non-productive." Assuming *arguendo* the correctness of this holding, the situation here is distinguishable. In *Pittsburgh*, strike activity was not itself the basis for denying the bonus, and in any particular period it was fortuitous whether it or some other factor would be the cause of the drop in productivity. Here, on the other hand, strike activity was the sole, and, indeed, the intended (see *supra*, pp. 15–16), basis for determining which employees would receive the seniority advantage and which would not. Moreover, in *Pittsburgh* the disadvantage incurred by the strikers was not unusually harsh, for strikers are not entitled to draw pay while on strike and the denial of a bonus because of lack of production during a strike is not too dissimilar. A grant of superseniority, on the other hand, visits an extreme and unusual penalty on the strikers (see *supra*, p. 22), and its effects last far beyond the particular strike.

tions Board v. *Hudson Motor Car Co.*, 128 F. 2d 528, 532–533 (C.A. 6); *Idaho Potato Growers* v. *National Labor Relations Board*, 144 F. 2d 295, 302–303 (C.A. 9), certiorari denied, 323 U.S. 769; *National Labor Relations Board* v. *Gluck Brewing Co.*, 144 F. 2d 847, 853 (C.A. 8); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 901–902 (C.A. 3); *Collins Baking Company* v. *National Labor Relations Board*, 193 F. 2d 483, 485–487 (C.A. 5); *National Labor Relations Board* v. *Oertel Brewing Co.*, 197 F. 2d 59, 61 (C.A. 6); *National Labor Relations Board* v. *McCatron*, 216 F. 2d 212, 215 (C.A. 9), certiorari denied, 348 U.S. 943; *National Labor Relations Board* v. *Richards*, 265 F. 2d 855, 860 (C.A. 3).

Thus, proof of discrimination on the basis of union membership or protected concerted activities, the natural and probable consequence of which is to encourage or discourage union membership, makes out both elements of a violation of Section 8(a)(3); and the unfair labor practice which Congress has forbidden cannot be excused on the ground that the infraction would better serve the employer's business interest.

This conclusion is consistent with *National Labor Relations Board* v. *Mackay Radio and Tel. Co.*, 304 U.S. 333. In *Mackay*, the Court held only that an employer may continue to run its business despite a strike and may therefore hire employees to fill the vacancies without being required to discharge the new employees at the end of the strike in order to make work available for strikers who wish to return to their positions. Such conduct, unlike respondent's, does not involve adopting a permanently discrimina-

tory classification upon the basis of strike activities. Since an employer is always privileged, in the absence of contractual obligations, to fill the places of employees who are absent from work for a substantial period, it can hardly be said that those returning strikers for whom no work is available because replacements are on the job are the victims of discrimination based upon their exercise of the right to strike. They have no jobs only because no work is available. To hold otherwise would prefer strikers to replacements. The only victims of discrimination in the *Mackay* case were the strikers whom the employer refused to put back to work because of their union activity. The Court held (304 U.S. 347) this discrimination to violate the Act without inquiring into whether the employer thought that the discrimination would assist him in operating a successful business. In the present controversy, therefore, when the Board found that the employer had in fact engaged in discrimination in favor of those who refrained from further strike activities and against those who continued to exercise their rights under Section 7, with the natural and probable consequence of discouraging union membership, all the facts essential to make out a violation of Section 8(a)(3) had been established and the employer's ultimate purpose became irrelevant.

Insofar as the opinion of Justices Harlan and Stewart in *Teamsters Local 357* v. *National Labor Relations Board, supra,* suggests that an employer's ultimate business purpose may justify discrimination based upon union membership or activities protected

by Section 7, the probable consequence of which is to encourage or discourage union membership, it is, in our view, contrary to the words of Section 8(a)(3), to the decisions of this Court, and to a long line of administrative and judicial precedents. Even if their view were to be accepted, however, it would not lead to affirmance of the decision below. The opinion of Justices Harlan and Stewart recognizes that not every business purpose assigned by an employer is sufficient to justify discrimination against employees based upon their union membership or protected activities. See 365 U.S. at 680–682. We have already shown that, if there is room for balancing the conflicting interests of the employer in operating the business and of the employees in freedom to engage in concerted activities without reprisal, the justification asserted by the employer in this case is insufficient to excuse the major interference with rights protected by the Act. See pp. 21–26, *supra*.

CONCLUSION

The judgment should be reversed and the cause remanded with instructions to enter a decree enforcing the order of the Board.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right

may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions gen-

erally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

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SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.